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ABSTRACT

The speaker examines the issue of the legal liability of individual school board members as it has arisen as a result of such court cases as Wood v. Strickland and Goss v. Lopez. The discussion includes questions of infringement on students' and teachers' rights and cases of school officials acting as individuals rather than in an official capacity. (IRT)

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LEGAL LIABILITY OF INDIVIDUAL SCHOOL BOARD MEMBERS

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Since the 1960's, the federal courts have revitalized §1983 of the Civil Rights Act of 1871. Originally enacted to vindicate the rights of blacks, this Act now provides protection to all against the misuse of official power. This federal statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

Today, the broad application of this Act to school officials is being experienced as students and teachers use the Act to enforce their alleged civil rights in the school setting. Until 1975, school board members were uncertain as to the extent of their personal liability in §1983 civil rights actions, for at common law, school officials were in general held to be immune from liability for injuries caused in the performance of their official duties if they acted without malice.[2] However, this was not the rule in all state jurisdictions and the extent to which school officials would be entitled to the defense of immunity in federal civil rights actions was unclear.

In Wood v Strickland, 420 U.S. 308 (1975), the United States Supreme Court dispelled much of the uncertainty.[3] The Court held that school board members may be held individually liable for damages when their actions violate the student's constitutional rights and they act out of ignorance or in disregard of "settled law." The board member's immunity was clearly held to be a qualified one.

Today, two years after the Wood decision, we are better able to evaluate and measure its implications and impact on school officials. Justice Powell, in his dissent to Wood, expressed concern that the majority of the court had imposed a standard of liability which would hinder effective performance of official duties and discourage potential school board candidates.[4] However, an examination of the cases since Wood indicated the standard is not unduly burdensome. School

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board members may avoid potential lawsuits if they have a basic understanding of the rights which have been extended to students and teachers and by frequent consultation and reliance on the advice of legal counsel.

In Wood, student plaintiffs claimed violations of their procedural due process rights in the handling of their suspensions from school. Under the applicable state law, school board members would have had immunity in all cases except where malice or ill will was proven. But the Supreme Court held that in federal actions under the Civil Rights Act, the school board members could be held liable for injuries caused without malice.

The Court held that a member had no immunity if:

> he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights.[5]

The Court reasoned that the action must be characterized as being in "good faith" to escape liability.

Although the Supreme Court limited its holding in Wood to the context of school discipline, courts will probably apply the standard generally.[6]

Justice Powell in his dissent predicted inevitable disputes concerning "undisputed law." He charged the majority with burdening school officials with the unrealistic requirement that they know the settled, undisputed rights of students.[7] However, lower courts have interpreted this requirement to mean rights protected by the law as it existed at the time of the alleged violation.[8] Thus, school board members are not "charged with predicting the course of constitutional law".[9]

Nevertheless, school officials are rightly concerned over the problem of determining what rights are constitutionally protected. This concern is particularly pertinent in the area of emerging civil rights. For example, in 1976, the 8th Circuit Court addressed this problem in an action brought by an unmarried female teacher against the school district and individual school board members. The teacher claimed her dismissal violated her constitutionally protected rights

to privacy and association.[10] The teacher was living with a male friend in a small rural community. Believing that common knowlege of this relationship detracted from her teaching ability, the board dismissed her on the grounds of incompetency. The court of appeals held that the board members were entitled to qualified immunity since they acted with "good faith". The court explained that while the right to live together might someday be recognized as a constitutional right, it had not been so recognized at the time of the action. Therefore, it could not be said that the members of the school board either knew or reasonably should have known that their actions would violate the constitutional rights of the teacher.

As a general rule, other courts have followed this rationale. If there is no clearly established constitutional right to certain conduct, a damage award against the school board members is barred.[11]

However, it appears some courts may deem the law to be settled without there having been a previous court ruling on the same facts. For example, an Illinois district court held school officials liable in damages to a student for violating the student's right to privacy in an unreasonable search.[12] The court ruled that the officials were liable for violating the settled, undisputed right to be free from unreasonable searches under the Fourth Amendment even in the absence of any prior case holding this protection applicable in the school setting.

Evidence that school officials acted in reliance on the advice of legal counsel will, I submit, heavily influence the court toward a finding of "qualified immunity."

The constitutionally protected rights of students have been substantially expanded in the area of free speech as related to student control. In 1969, the United States Supreme Court established free speech standards for public school students in Tinker v Des Moines Independent Community School District.[13] The Court declared student suspensions for wearing Vietnam war protest armbands to be a constitutional violation of the students' First Amendment "free speech" right. The Court held that restrictions on a student's free speech were permissible only if the student's speech:

a) interferes with the educational program,

b) involves substantial disorder or

c) involves the invasion of the rights of others.

Therefore, Tinker makes it clear that a student's free speech rights are not absolute; they must be balanced against the duty of the school authorities to maintain discipline and provide an atmosphere that is conducive to learning.

The standards set forth in Tinker have been applied in several court decisions upholding student challenges to school board rules restricting student publications,[14] and hair styles.[15] However, in the absence of a definitive Supreme Court ruling defining the student's rights in these areas, the law remains unsettled across the nation for lower federal courts remain severely split in their rulings.[16] Therefore, it is important for school board members to know the status of the local law on student rights.

There is also a lack of uniformity in the lower courts on the extent of the right to use corporal punishment in school. Generally courts have held that reasonable corporal punishment is not a violation of 8th Amendment guarantees against cruel and unusual punishment, reasoning that it is rationally related to the goal of maintaining the classroom atmosphere required for education. Currently, the Supreme Court is reviewing a 5th Circuit case upholding the constitutionality of allegedly excessive corporal punishment.[17]

Shortly before Wood v Strickland, the Supreme Court rendered another important decision in the area of student control. In Goss v Lopez, 419 U.S. 565 (1975), high school students filed a civil rights action alleging deprivation of their constitutional rights when they were suspended 10 days without a hearing.[18] The students claimed they were denied their right to an education. Earlier, in 1973, the Court had ruled that there was no constitutional right to an education.[19] However, the Goss Court noted that protected interests in education normally are created by an independent source, such as state law,[20] and that under Ohio law, the students had a right to an education. Once a state grants a student the right to an education, that right

may not be denied without the protections of due process required by the 14th Amendment. An interruption of the student's education for 10 days was held so serious it demanded that the student be given prior notice and the opportunity to explain his or her version of the incident. The court cautioned that longer periods of suspension or expulsions for the remainder of the school term, or permanently, would require a more formal procedure.

Since Goss, students and parents have sued in ever increasing numbers alleging deprivation of their rights or their children's rights to an education. Lower courts have and are wrestling with the problem of defining a protected interest in education. A number of student athletes have alleged deprivation of a protected interest when school authorities denied them the opportunity to participate in interscholastic competition. But most of the courts considering the matter have held there is no protected property or liability interest in interscholastic competition, despite the potential remunerative future of a college scholarship or a professional contract.[21] Yet, a Minnesota district court recently found a protected property interest did exist in a University of Minnesota athlete who had been denied the opportunity to participate in interscholastic basketball competition. The court stressed the fact that the athlete involved was at the college and not the high school level.[22]

In January of 1977, a Pennsylvania district court held that a deprivation of protected property and liberty interests occurred when a school district transferred a student involuntarily for disciplinary purposes.[23] The court stated that while a transfer from one school to another does not in theory reduce the educational experience, a disciplinary transfer bears the stigma of punishment. Since the transfer may have an adverse impact on the students educational process, some kind of notice and hearing must be provided before the transfer.

The full implications of Goss and Wood are not yet known. At first glance, these decisions appear to substantially expand the rights of students, yet there are indications in the opinions that henceforth, the court will limit access to federal court in student control cases. The court in Wood observed that the civil rights statute does not extend the right to relitigate in Federal Court

evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The court recognized that our system of public education necessarily relies upon the discretion and judgment of school administrators and school board members and that §1983 was not intended to be a vehicle for federal court correction of errors made in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. I discern an encouraging trend by the courts to apply these limiting implications of Goss where the exercise of school board discretion and judgment rather than constitutional rights is the only issue involved.

Beyond the area of student rights, school board members risk personal liability for the deprivation of a school employees constitutionally protected rights. An area with high potential for liability is in the termination of a teacher's employment. School board members may be held liable in damages when terminating employment, if, under the Wood standards, they violate the teacher's constitutional rights. The violation may occur if a motivating reason for termination is a constitutionally impermissible one. But under a recent Supreme Court decision the board's action will not be constitutionally barred if the board demonstrates that the decision to terminate employment would have been reached even in the absence of the impermissible reason.[24]

Plaintiffs frequently allege that termination of employment was based on the teacher's exercise of 1st Amendment rights of free speech and association and therefore, is constitutionally impermissible. Nevertheless in many instances, the terminated employee is unable to substantiate such a claim.[25] Addressing this problem, one federal court recently noted:

> Federal courts must be vigilant to protect the First Amendment rights of all citizens. But they must also be careful not to permit the use of speech to become a cloak for protection against the consequences of one's misconduct or incompetence.[26]

When terminating employment, school board members may also incur liability if a teacher entitled to due process is denied the required procedures. In 1972, the United States Supreme Court in Roth and Sindermann set forth the basic rules for determining when due process is required.[27] Procedural due process is required where the teacher will be deprived of a liberty or property interest protected by the 14th Amendment of the U.S. Constitution.

A teacher will be deprived of a liberty interest where a charge is made against the teacher that would seriously damage his or her standing in the community, or if in declining to reemploy the teacher, a stigma attaches which forecloses the teacher's employment opportunities elsewhere. However, the mere fact that nonretention has unquestionably made a teacher less attractive to other employers does not amount to a deprivation of liberty.[28]

A teacher has a protected property interest if he or she has a) acquired statutory tenure, b) acquired tenure through an express contract (including a collective bargaining agreement) or c) acquired a de facto type of tenure by reason of school practices, policies, or guidelines. As stated earlier, property interests entitled to due process protection are not derived from the Constitution but normally stem from independent sources - primarily state law.

Since Roth and Sinderman, there have been indications that the Supreme Court is reluctant to further expand the right to procedural due process in termination of employment. In a 1976 decision it was held that reputation alone, apart from some more tangible interest (such as loss of license or employment) does not implicate a liberty or property interest.[29] The Court has also held in another 1976 decision that there is no invasion of a liberty interest when the reasons given for nonrenewal are wholly false and constitute a stigma, but are given to the employee privately.[30]

In addition to the areas of personal liability which I have already discussed, I would like to briefly mention two related, noteworthy developments.

The Supreme Court is presently reviewing a basic issue pertaining to §1983 civil rights actions. Since its 1961 decision in Monroe v Pape[31] holding a municipal corporation is not a "person" subject to suit within the meaning of the statute, school boards and other educational agencies and board members thereof when sued in their official capacities have in most cases been given the same exemption from suits for damages but are held to be "persons" within the meaning of §1983 when sued for injunctive or declaratory relief such as reinstatement to the job.[32]

School officials who act outside the scope of official duties in a tortious manner are "persons" under the Act and may be sued individually for damages. The case currently before the Court for review involves a 2nd Circuit decision which held that individual City Board of Education Members sued in official capacities for damages were not "persons" subject to suit within the meaning of §1983.[33] The 2nd Circuit pointed out that the damages sought against the individual board members and other city officials sued in their official capacities, would have to be paid from the city treasury;

> The mere substitution of the name of the official for the name of the city cannot be used as a subterfuge to circumvent the intent of Congress. Thus we must consider the suit ... to have been brought directly against the City and Board of Education, which, ... are not "persons" for purposes of §1983.

Should the Supreme Court reverse the 2nd Circuit, further monetary awards under §1983 will undoubedly be reflected in the school budget. If the court affirms, it is reasonable to assume that plaintiffs suing under §1983 will diligently attempt to state a cause of action against board members in their individual capacities.

There is also the possible threat of increased liability under recent federal statutes guaranteeing students and teachers additional rights which may constitute "settled, undisputed law" within the meaning of the Wood v Strickland test for personal liability.[34] For example, one district court recently held that an employee could base her suit for damages against the board of education on Title IX of the 1972 Educational Amendments to the 1964 Civil Rights Act.[35]

Finally, since school board members do face the risk of lawsuits and damage awards, it is most desirable if not essential that board members be adequately covered by the special type of liability policy which provides coverage to individual board members and the school district for wrongful acts in the nature of errors and omissions in the performance of official duties.

Many states do have indemnification statutes which provide that damages, as well as costs of defending the action will be paid by the school district if the board members action is within the scope of

employment or official duty. However, not all states provide this statutory protection. If your state does not, it is all the more compelling that your district protect you by this type of errors and omissions insurance.

Unfortunately, adequate errors and omissions cov rage is not generally available in the insurance market as of today. Several school districts in my state of Wisconsin have had their coverage terminated and some are finding it impossible to procure adequate coverage.

Footnotes

1. 42 U.S.C. §1983 (1971)
2. 57 Am. Jur. 2d, Municipal, Tort Liability §§11,94 (1971); 79 C.J.S., Schools and School Districts §503(d) (1952)
3. Wood v Strickland, 420 U.S. 308; 95 S.C., 992 (1975)
4. Id at 331
5. Id at 332
6. Mims v Board of Ed. of City of Chicago, 523 F. 2d 711 (7th Cir., 1975)
7. Wood, supra at 329
8. Hostrop v Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975) at 577-78; Mims, supra at 716
9. Woods, supra at 322
10. Sullivan v Meade, 530 F.2d 799 (8th Cir. 1976)
11. See Sapp v Renfroe, 511 F.2d 172 (5th Cir., 1975) school board members entitled to qualified immunity because there was no clearly established constitutional right not to attend ROTC class
12. Picha v Wielgos, 410 F. Supp. 1214 (N.D. Illinois, E.D., 1976)
13. 393 U.S. 503; 89 S.C. 733 (1969)
14. Fujishimi v Bd. of Ed., 460 F.2d 1355 (7th Cir. 1972). Compare Oxfeld v New Jersey State Bd. of Ed., 344 A.2d 769 (N.J. 1975)
15. Breen v Kahl, 419 F.2d 1034 (7th Cir., 1969)
16. With Zeller v Donegal School Dist. Bd. of Ed., 517 F.2d 600 (3rd Cir., 1975) the 3rd Circuit joined the 6th, 9th and 10th Circuits in holding the right to choose one's hair style does not rise to the level of a protected right.
17. Ingraham v Wright, 525 F.2d 909 (5th Cir., 1976); Cert. granted _____ U.S. _____, 96 S.Ct. 2200 (1976)
18. Goss v Lopez, 419 U.S. 565; 95 S.C. 729 (1975)
19. San Antonio Independent School District v Rodriguez, 411 U.S. 1; 93 S.C. 1278 (1973)
20. Goss, supra at 572-573, quoting from Board of Regents v Roth, 408 U.S. 564, 577 (1972)
21. Albach v Odle, 531 F.2d 983 (10th Cir., 1976); Dallom v Cumberland Valley School Dist., 391 F. Supp. 358 (M.D. Pa., 1975)
22. Regents of University of Minnesota v N.C.A.A., 422 F. Supp. 1158 (D. Minn., 1976)
23. Everett v Marcase (E.D. Pa., 1/27/72) 45 L.W. 2380
24. Mt. Healthy City School District Board of Ed. v Doyle, _____ U.S. _____, 97 S.Ct. 568 (1977)
25. Prebble v Brodrich, 535 F.2d 605 (10th Cir., 1976); Patterson v Ramsey, 413 F. Supp. 523 (D. Maryland, 1976)

26. Williams v Day, 412 F. Supp. 336, 340 at fn. 1 (E.D. Ark, 1976).
27. Board of Regents v Roth, 408 U.S. 564; 92 S.C. 2701 (1972); Perry v Sindermann, 408 U.S. 593; 92 S.C. 2694 (1972).
28. Shirk v Thomas, 486 F.2d 691, 693 (7th Cir. 1973).
29. Paul v Davis, 424 U.S. 693; 47 LEd 405, (1976).

30. Bishop v Wood, 426 U.S. 341; 48 LEd 684 (1976).
31. Monroe v Pape, 365 U.S. 167; 81 S.C. 473 (1961).
32. Cases holding school board is not a "person" include: Mims, supra; Fanning v School Bd. of Indep. School Dist. No. 23 of Jefferson City. 395 F. Supp. 18 (WD. Okla, 1975); Grubbs v White Settlement Indep. School Dist., 390 F. Supp. 895 (N.D. Tex., 1975); Patton v Conrad Area School District, 388 F. Supp. 410 (D. Del., 1975).
    Compare: Keckeisen v Independent School District No. 612, 509 F. 2d 1062 (8th Cir., 1975).
33. Monell v Dept. of Soc. Serv. of City of New York, 532 F. 2d 259 (2nd Cir., 1976); cert. granted 45 LW 3499.
34. E.G. Education of the Handicapped Amendments of 1974, 20 U.S.C. §1413(9)(13) and Rehabilitation Act of 1973, 20 U.S.C. §794. See Gurmankin v Costanzo, 411 F. Supp. 982 (E.D. Pa., 1976).
35. Piascik v Cleveland Museum of Art, (N.D. Ohio, 12/2/76), 45 LW 2310.